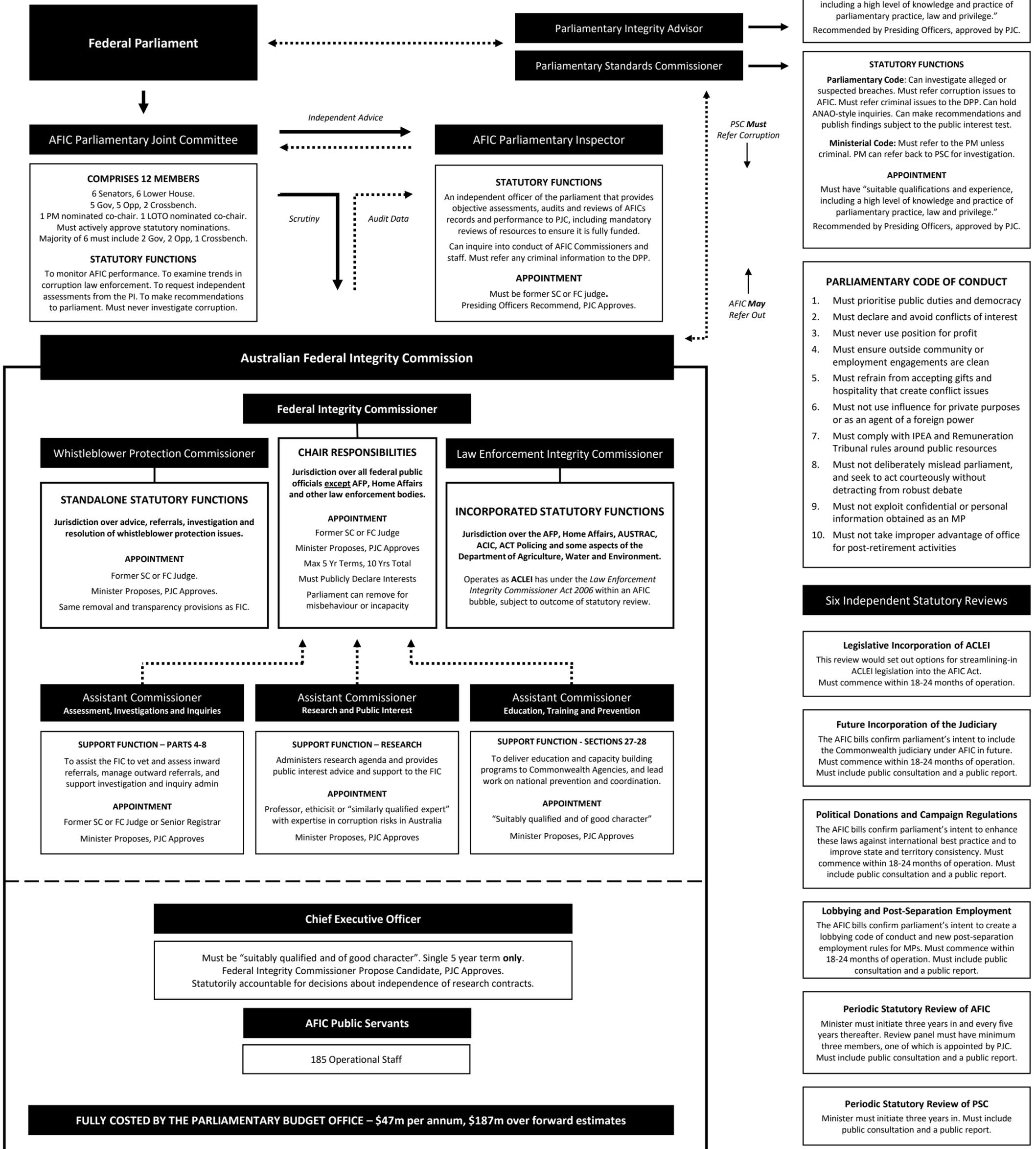


# THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

## PARLIAMENTARY OVERSIGHT, STATUTORY APPOINTMENTS AND REVIEWS

OFFICE OF DR HELEN HAINES MP





# THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

## INVESTIGATORY PROCESSES, POWERS AND SAFEGUARDS

OFFICE OF DR HELEN HAINES MP

### PRACTICAL DEFINITION OF CORRUPT CONDUCT

### 'THE INVESTIGATORY FUNCTION'

#### STAGE TWO – INVESTIGATION AND INQUIRY

#### INVESTIGATING A SPECIFIC CASE "IN ITS OWN RIGHT"

Once vetted, AFIC can use its powers to investigate a specific case and make corresponding recommendations. These powers are not automatic and have clear safeguards:

- ✓ **An enshrined opportunity to be heard** – If AFIC has an opinion or finding that is critical of a person or agency, that opinion or finding is **preliminary** until that person or agency has an opportunity to provide a written statement and appear before AFIC and make oral submissions with legal representation.
- ✓ **Opportunities for public and private hearings** – AFIC can hold hearings in public or private. It must only hold hearings in public if it meets a new **public interest test** in section 86(4). The Federal Integrity Commissioner must consider the public interest test for each hearing. Thus, the likelihood of private hearings is much higher in the earlier stages of an investigation where personal reputation or prejudice risks may be greater by association. Unlike other models where the discretion embedded in the public interest test is broad, the Commissioner must weigh up specific factors, on balance, against the interest of the public to have transparency. This includes:
  - Evidence-based advice provided by the new Assistant Commissioner for Research and Public Interest, who will be a Professor or ethicist with expertise in integrity and anti-corruption, about the **seriousness and/or systemic nature** of the type of corruption issue at hand
  - Whether evidence that may be given by a person, or a matter that may arise during the hearing (or that part of a hearing), is **confidential in nature** (including journalistic sources), relates to the confidential operations of the commission, or to the alleged or suspected commission of an offence
  - Any unfair **prejudice to a person's reputation** or **unfair exposure of a person's private life** that would be likely to be caused if evidence was given in public, or if a matter that may arise during the hearing (or that part of the hearing) is heard in public, including by way of simple association with the commission
  - Whether the person is under the **direct instruction or control of another**, such as a junior staff member and other relationships that involve significant power differentials
  - Any other relevant matters.
- ✓ **All persons asked to appear before AFIC can request to have a private hearing, based on the public interest test above, in a private pre-hearing with the FIC**
- ✓ **Compelling specific documents or items** – The Federal Integrity Commissioner can issue signed notices that require a person or organisation to produce a specific document or item that relate to the investigation. There are criminal penalties for non-compliance, unless performance is not possible. Recipients can only claim legal professional privilege if the document or item involves legal communication related to the AFIC matter at hand. Notices to produce can be **confidential**.
- ✓ **Compelling persons to give evidence** – The Federal Integrity Commissioner can issue signed notices that require a person to attend a hearing and give evidence. That person can request to give evidence in private, and call on the Federal Integrity Commissioner to revisit the public interest test. Those compelled can only claim legal professional privilege if the evidence involves legal communication related to the AFIC matter at hand. Notices to appear can be **confidential**.
- ✓ **Witness protections** – Witnesses have the same protections afforded to witnesses in the High Court. Witnesses can also request specific persons not attend the hearing room while giving evidence. The bill gives the example of witnesses, such as junior staff, who were wholly subordinate to a person alleged to have engaged in corrupt conduct as a compelling example of a situation where risk to personal reputation is high if a public hearing were to be held.
- ✓ **Holding hearings outside of Australia** – If Australia has a bilateral agreement with that country allowing AFIC to do so.
- ✓ **Issuing search warrants and powers of arrest** - AFIC can work with AFP officers (or another suitably-qualified persons if the AFP is the subject of the investigation) to apply for search and arrest warrants from a relevant court if there is a reasonable suspicion evidence will be concealed, lost, mutilated, or destroyed in the next 72 hours. Boilerplate criminal procedure safeguards apply to the use of this power, including limitations to the reasonable use of force to enter a property and special provisions about the handling of seized electronic materials, for example.
- ✓ **Mandatory referrals of criminality** – Conduct that could amount to a criminal offence is only one part of the working definition of corrupt conduct for the purposes of AFIC investigations and inquiries. Should AFIC comes across evidence of criminality, wrongful conviction or the proceeds of crime in an investigation or hearing, it must hand it over to the DPP or relevant prosecuting authority.

Beyond decisions to hold public hearings, these suite of powers available to the Federal Integrity Commissioner must always be used on balance, with an overall focus on dedicating its resources and attention to **serious and/or systemic corruption issues**, and obtaining the necessary information to make rigorous findings and recommendations.

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#### INVESTIGATING SYSTEMIC ISSUES THROUGH PUBLIC INQUIRIES

AFIC can hold a broader public inquiries, including a public submissions process, into major corruption issues, risks or themes. A public inquiry may involve a specific case or number of specific cases, or may involve no specific cases and instead deal with broader systems and processes. The purpose of a public inquiry is to arrive at a set of future-facing policy or law reform recommendations that improve integrity in federal public administration.

- ✓ **AFIC can only undertake a public inquiry if it meets a public interest test, as formulated above.**

Either House of Parliament can request that AFIC undertake an inquiry into a particular corruption issue. AFIC is not required to proceed, however, if it determines that it does not meet the public interest test for public inquiries.

# THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

## FINDINGS AND REPORTING, THE DUAL DEFINITIONS OF CORRUPT CONDUCT

OFFICE OF DR HELEN HAINES MP

### PRACTICAL DEFINITION OF CORRUPT CONDUCT

### 'THE INVESTIGATORY FUNCTION'

#### STAGE THREE – FINDINGS AND REPORTING

#### REPORTING ON AFIC-LED INVESTIGATIONS

AFIC must prepare a report at the end of an investigation setting out:

- ✓ AFICs justification for proceeding with the investigation
- ✓ AFICs findings in relation to the corruption issue at hand
- ✓ Evidence upon which those findings are based
- ✓ Any recommended actions AFIC makes based on those findings, including:
  - Actions to mitigate the immediate impacts of the corrupt conduct
  - Adoption of new policies to prevent similar corrupt conduct in future
  - Termination of employment or performance management of specific individuals
  - Referral of information or the matter at-large to the DPP or other bodies

AFIC must again visit the **public interest test** when deciding whether to publicly disclose personal information.

#### REPORTING ON AFIC-LED INQUIRIES

AFIC must prepare a report at the end of the public inquiry that includes recommendations designed to limit ongoing or future issues. AFIC must give the report to the Minister, who must table the report in Houses at the parliamentary next sitting. AFIC can produce stand-alone reports on persons exonerated of claims through the AFIC investigatory process as a safeguard against unnecessary damage to personal reputation, in addition to the procedural safeguards.

#### REPORTING ON REFERRED-OUT INVESTIGATIONS

The Commonwealth Agency to whom AFIC referred the matter to must prepare a report, which may include recommendations. The Commonwealth Agency is also required to give AFIC an opportunity to comment on the report before it is finalised.

#### PROTECTING SENSITIVE INFORMATION

*These reports must not contain “sensitive personal information” that could endanger a person’s life, compromise other corruption investigations, compromise court proceedings, compromise national security, expose protected cabinet deliberations, or amount to “an **unreasonable disclosure of personal affairs** or an unreasonable disclosure of confidential commercial information”.*

*The interpretation of “unreasonable disclosure of personal affairs” uses the same “public interest test” for public and private hearings.*

*The presence of sensitive information in an investigation or inquiry should not limit AFICs ability to undertake that investigation or inquiry, and make subsequent findings. If need be, AFIC can present the Minister with a confidential Supplementary Report with sensitive information.*

## THE TWO DEFINITIONS OF CORRUPT CONDUCT

### BROAD DEFINITION OF CORRUPT CONDUCT

FOCUS: EDUCATION, TRAINING, PREVENTION, POLICY AND RESEARCH

#### Any conduct, by any person, that:

adversely affects the honest or impartial exercise of Parliament, a commonwealth agency, or public official/s function/s involves or is intended to induce a public official to put private interests over the public good in their official duties involves or could impair the efficacy and probity of an exercise of an official function, or public administration, by a public official

#### Any conduct, by any public official, that:

constitutes or involves the dishonest or impartial exercise of official functions

constitutes or involves breach of public trust

constitutes or involves abusing public office

constitutes or involves misuse of official information for private benefit – be it for themselves or another person

**It includes conduct that occurred before the Act commenced, based on the laws and standards applicable at that time**

#### For the avoidance of doubt, the broad definition definitely includes:

Official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition); conduct constituting an offence against section 142.2 of the Criminal Code (abuse of public office); bribery; blackmail; obtaining or offering secret commissions; fraud; theft; perverting the course of justice; embezzlement; election bribery; election funding offences; election fraud; treating; tax evasion; revenue evasion; currency violations; illegal drug dealings; illegal gambling; obtaining financial benefit by vice engaged in by others; bankruptcy and company violations; harbouring criminals; forgery; homicide or violence; collusive tendering; impropriety in government procurement; breaches of lobbying codes of conduct; and matters of the same or similar nature to the above, including any conspiracy or attempts in relation to the above

### PRACTICAL DEFINITION OF CORRUPT CONDUCT

FOCUS: INVESTIGATION AND INQUIRIES

#### Any conduct that:

1. Meets the broad definition of corrupt conduct

AND

2. Could also constitute or involve:
  - a. A criminal offence or an act giving rise to civil liability
  - b. A disciplinary offence
  - c. Reasonable grounds for dismissal or termination
  - d. A substantial breach of a code of conduct

The reference to ‘criminal offence’ in subsection 2(a) is not intended to replace any criminal jurisdiction. AFIC has a positive duty to hand over any information that suggests criminality, wrongful conviction or the presence of proceeds of crime to the DPP for investigation. A subsequent criminal conviction does not preclude AFIC from also finding the presence of ‘corrupt conduct’ under this definition for the purpose of AFICs statutory responsibility to investigate and resolve all manner of serious corrupt conduct in federal public administration.